IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7264 OF 2004

1. Hindustan Construction Co. Ltd.
a public limited company under
the provisions of the Companies
Act, 1956 having its registered
office at Hincon House, L.B.S.
Marg, Vikhroli (W), Mumbai - 83

2. Mr.Mahadevan Parameswaran, age
about 50 years of Mumbai, Indian
Inhabitant residing at 204,
Victoria Classic, opposite Asha
Nagar, Off P.K. Road, Mulund
(West), Mumbai - 400 080 .. Petitioners.

V/s.

1. Konkan Railway Corporation Ltd.
a Government of India Undertaking
having its office at Raigadh
Bhavan, 8th Floor, Plot No.4,
Sector 11, C.B.D. Belapur,
Navi Mumbai - 400 614

2. The General Manager (Projects)
Konkan Railway Corporation Limited
having its office at Raigadh
Bhavan, 8th Floor, Plot No.4,
Sector 11, C.B.D. Belapur,
Navi Mumbai - 400 614

3. Afcons Infrastructure Ltd.,
a public limited company under
the provisions of the Companies
Act, 1956 having its registered
office at Afcons House, 16, Shah
Industrial Estate, Veera Desai
Road, Azad Nagar, P.O., Andheri
(West), Mumbai - 400 053.

4. Ultra Construction & Engineering
Co. Ltd., a company incorporated
under the relevant provisions of
law of Korea, having its office at
75-95, Seasomoon-Dong, Chung-Ku,

Seoul, Korea 100-110, and also
having it's office at 41-411,
International Trade Tower,
Nehru Place, New Delhi 110 019,
India

5. Ssang Yong Engineering &
Construction Co.Ltd., a company
incorporated under the relevant
provisions of law in Korea, having
its office at 7-23, Shinchon-Dong,
Songpa-Gu, Seoul, Korea 138-726,
and also having its office at
2nd floor, A-11, Neeti Bagh,
New Delhi - 110 049, India .. Respondents.

Mr.Janak Dwarkadas, Senior counsel with Mr.Shaunak Kantawala i/b. Harish Joshi & Co. for the petitioners.

Mr.Kiran Baghalia i/b. Ms.Asha Bhambani for the respondent Nos.1 and 2.

Mr.I.M. Chhagla, Senior counsel with Mr.K.N. Munshi i/b. Crawford Bayley & Co. for the respondent No.3.

Mr.S.H. Aney, Senior counsel with Mr.Feroz Puniwala i/b. Crawford Bayley & Co. for the respondent No.4.

CORAM : R.M. LODHA, &
J.P. DEVADHAR, JJ.

DATED : 7TH OCTOBER, 2004.

ORAL JUDGMENT (Per R.M. Lodha, J.) :

We heard the learned senior counsel and the counsel for the parties at quite some length at the motion hearing stage.

2. At the outset, the learned senior counsel

for the petitioners sought leave to amend the writ petition as per draft amendment handed in and marked 'X' for identification purpose. There is no serious opposition to the draft amendment. As it is, the writ petition is at the motion hearing stage and we are satisfied that the leave may be granted to the petitioners to amend the writ petition as per draft amendment. We order accordingly. The necessary amendment be carried out in the writ petition by the petitioners immediately.

3. The Konkan Railway Corporation Limited (for short 'the Corporation') - respondent No.1 has awarded the contract for design and construction of a special bridge across river Chenab at Km. 50/800 on the Katra - Laole section of the Udhampur - Srinagar - Baramulla rail link project to the joint venture of respondent Nos.3 and 4. The first petitioner who gave joint venture bid alongwith respondent No.5 aggrieved thereby has filed this writ petition.

4. Mr.Janak Dwarkadas, the learned senior counsel for the petitioners raised three fold submission (one) That the tender of joint venture of respondent Nos.3 and 4 was liable to be rejected as non-responsive because they did not indicate in their

offer, prices for leaving auxiliary bridge / cable crane in position as it is after commissioning of the main bridge or taking back such auxiliary bridge or cable crane. According to the learned senior counsel under clauses 3.6.1 and 3.1.2 (as amended by Corrigendum No.3) it was mandatory on the part of the tenderer to indicate in their offer, prices of the auxiliary bridge / cable crane, if such bridge / cable crane is left in position as it is after commissioning of the main bridge and if such bridge / cable crane is taken back by the contractor after commissioning of the said project. By not indicating in their offer whether the price quoted by them includes leaving behind the said auxiliary bridge / cable crane after completion of the said project or taking away the said bridge / cable crane with them after completion of the said project, the respondent Nos.3 and 4, according to the learned senior counsel for the petitioners, tried to take a chance of looking at the offers of the other tenderers and thereafter take a stand that suited their convenience (two) The bid of the joint venture of the petitioner No.1 and respondent No.5 was lowest, and being the lowest bidder the joint venture of petitioner and respondent No.5 ought to have been awarded the contract (three) The design submitted by the

respondent Nos.3 and 4 for the main bridge was not as per the requirements of the technical specifications given in the tender. The said design has been altered after the award of contract from which it was clear that the technical evaluation could not have taken place. The learned senior counsel thus submitted that the action of the respondent No.1 in awarding the contract to the joint venture of respondent Nos.3 and 4 suffers from malice in law. The learned senior counsel in support of his submissions relied upon the judgment of the Supreme Court in the case of Harminder Singh Arora V/s. Union of India & Others [(1986) 3 SCC 247].

5. The learned senior counsel for the respondent Nos.3 and 4 and the learned counsel for respondent No.1, on the other hand, justified the action of respondent No.1 in award of contract to the joint venture of respondent Nos.3 and 4 and submitted that the action of respondent No.1 cannot be said to suffer from lack of transparency or fairness nor can the action of respondent No.1 be said to be against the public interest. They relied upon the decisions of the Supreme Court in (i) The State Financial Corporation V/s. M/s. Jagdamba Oil Mills [AIR 2002 SC 834], (ii) Kanhaiya Lal V/s. Union of India, [AIR

2002 SC 2766], (iii) Raunaq International Ltd. V/s. I.V.R. Construction Ltd. [AIR 1999 SC 393], (iv) Asia Foundation & Construction Ltd. V/s. Trafalgar House Construction (I) Ltd. [(1997) 1 SCC 738], (v) Tata Cellular V/s. Union of India [(1994) 6 SCC 651], (vi) Poddar Steel Corporation V/s. Ganesh Engineering Works [AIR 1991 SC 1579], (vii) G.J. Fernandez V/s. State of Karnataka [AIR 1990 SC 958] and (vii) Air India Ltd. V/s. Cochin International Airport Ltd. [(2002) 2 SCC 617].

6. We reflected over the submissions of the learned senior counsel and the counsel for the parties.

7. From the available material before us the broad facts that emerge are thus :

. That on November 19, 2003 the respondent No.2 on behalf of the Corporation issued notice inviting global tenders for the design and construction of a special bridge across river Chenab on the Katra - Laole section of the Jammu - Udhampur - Srinagar - Baramulla rail link project. In the notice inviting tenders the prospective bidders were informed of the complexity of the project and the

infrastructure. On January 20, 2004, the stage one tender was opened. The four firms including the joint venture of the first petitioner and the respondent No.5 submitted their offers. The Technical Advisory Board was constituted comprising of 14 members that included the experts from IIT's, Technical Institutes, Research, Design and Standard Organisation, Railway Board, Northern Railway and the Corporation. The function of the Technical Advisory Board being to frame and design parameters, finalise technical specifications and assist in short-listing the bidders. The participating firms made their respective representations to the Technical Advisory Board on February 10, 2004. On March 16, 2004 the Technical Committee concluded that the reports of all the four bidders were satisfactory and worthy of further consideration and on that day pursuant to the approval of the Technical Advisory Board tender notice was issued to the four bidders for stage-II bidding. The stage-II bid consisted of technical bid and commercial bid. The Technical Advisory Board on April 12, 2004 met the representatives of the bidders to discuss with them the technical aspects and requirements and special technical conditions. On May 20, 2004, the Technical Advisory Board held further discussions with the bidders for pre-bid

discussions on technical special conditions and issues in the presence of special invitees and concerned officers of the Corporation. In the meanwhile, Corrigendum 1,2 and 3 were issued by the respondent No.2 clarifying, modifying and changing certain clauses of the tender notice. As scheduled, on May 31, 2004 the technical bids were opened. The technical committee of five members (three from outside and two from the Corporation) was nominated to scrutinise the technical offers. On July 12/13th, 2004, after going through the details and presentations made by the four bidders, the technical committee was of the opinion that all the four bidders including the joint venture of first petitioner and respondent No.5 and the joint venture of respondent Nos.3 and 4 were worthy of consideration. The Corporation, thereafter on July 15, 2004 informed all the four bidders about the acceptability of their technical bids subject to certain clarifications / confirmations on some deviation noticed during the technical scrutiny of their offers. All the four bidders were advised of the date for opening commercial bids. The commercial bids were opened on August 19, 2004. The offer of joint venture of respondent Nos.3 and 4 was found to be the lowest at the unit rate and they were

ultimately awarded the contract.

8. In the backdrop of the aforesaid facts, we now examine ad seriatim the submissions of the learned senior counsel for the petitioners.

Re : (one) Offer of the first petitioner and respondent No.5 whether non responsive.

9. Clauses 3.1.2, 3.6.1 and 3.5.14 of the tender notice read thus :

> "3.1.2 Design and construction of Auxiliary suspension / Cable stayed bridge with a capacity to support the launching equipments, bridge segments need to be developed, constructed and will remain as a permanent emergency access to the main bridge and quick restoration of the main bridge in case of need.
>
> 3.5.14 It is envisaged that Auxiliary arrangement such as cableways etc. for erection of equipments / launching equipments could later be used during a disaster. These should therefore be available to Railway after completion of the Bridges.
>
> 3.6.1 Auxiliary suspension / cable stayed system with a capacity to support launching equipments, bridge segments need to be developed, constructed and will remain as emergency access to the main bridge and quick restoration of the main bridge in case of

use."

10. Clauses 3.1.2 and 3.6.1 were modified by Corrigendum 1. Clauses 3.6.1 and 3.1.2 were collectively modified and the said modified clauses vide Corrigendum 1 read thus :

3.6.1 & 3.1.2	Auxiliary suspension / cable stayed system with a capacity to support launching equipments, bridge segments need to be developed, constructed and will remain as emergency access to the main bridge and quick restoration of the main bridge in case of emergencies. Auxiliary bridge erected to enable the erection of bridge during construction will be left intact upon completion of bridge.

11. By subsequent Corrigendum 3, Clauses 3.1.2 and 3.6.1 were further modified which read thus :

3.6.1 & 3.1.2	The auxiliary bridge, if constructed as a part of enabling structure, will be designed for construction loads only. The bidder has to indicate in their offer prices for :- a) if such bridge is left in position as it is, after commissioning of bridge. b) if such bridge is taken back by the contractor, after commissioning of bridge.

12. The grievance of the petitioner is that

the respondent Nos.3 and 4 in their offer did not indicate, prices for leaving auxiliary bridge / cable crane in position as it is after commissioning of the main bridge or taking away such auxiliary bridge / cable crane. The respondent Nos.3 and 4, according to the petitioners, did not indicate the option so that they could take a chance of looking at the offer of other tenderers and thereafter take a stand that suited their convenience. Having considered the modified clauses 3.6.1 and 3.1.2 we find substance in the submission of respondent No.1 that the object of the modified clauses 3.6.1 and 3.1.2 is a sort of advice to the bidder to indicate in their offer prices for if such bridge was left in position as it is after commissioning of bridge or if such bridge was taken away by the contractor after commissioning of the main bridge without adversely affecting the rights of the respondent No.3. Non mentioning of the option by the bidder in terms of clauses 3.6.1 and 3.1.2 cannot, in our opinion, make the offer non-responsive. Surely Clauses 3.6.1 and 3.1.2 are not the essential conditions of the tender document. Omission to mention the option by the bidder as contemplated by Clauses 3.6.1 and 3.1.2 has to be treated as if the bidder is not desirous of taking back auxiliary bridge / auxiliary crane. The

contention of respondent Nos.3 and 4 is that the modified clauses 3.6.1 and 3.1.2 are only restricted to auxiliary bridge if so constructed by the bidder as part of the structure and not the auxiliary cable crane or auxiliary way and since the respondent Nos.3 and 4 only offered for construction of cable ways as part of the main structure, clauses 3.6.1 and 3.1.2 were not attracted may not be acceptable construction of modified clauses 3.6.1 and 3.1.2 because the expressions, ‘auxiliary bridge’, ‘auxiliary cable ways’, appear to have been loosely used in the tender document as well as corrigendum and what was meant by such clauses was auxiliary arrangement as part of the enabling structure. However that does not improve the case of the petitioners. The fact that the respondent Nos.3 and 4 did not specifically indicate in their offer prices that such auxiliary arrangement as a part of enabling structure is left in position as it is after commissioning of main bridge has to be treated that such auxiliary arrangement as part of enabling structure was to be left in position as it is after commissioning of the main bridge. This is how the Corporation considered the offer of respondent Nos.3 and 4. Strictly speaking the manner in which the option relating to auxiliary cableways has been given by the first petitioner and the

respondent No.5 in their offer also cannot be said to be in conformity with the modified clauses 3.6.1 and 3.1.2. That would show that the said clauses are not the essential conditions of the tender. The offer of the respondent Nos.3 and 4, thus, cannot be held to be non-responsive.

Re : (two) Whether offer of the first petitioner and respondent No.5 lowest.

13. The contention of the learned senior counsel that the offer of the joint venture of first petitioner and the respondent No.5 is the lowest is unfounded. From the comparative assessment of the bids it transpires that the joint venture of the first petitioner and the respondent No.5 gave two proposals. The main offer price of the petitioner and the respondent No.5 for 1320m in case of the auxiliary cableways being left in position as it is after commissioning of main bridge is Rs.533.076 crores. In the alternative proposal (1308m) the joint venture of the petitioner and the respondent No.5 offered the cost of Rs.522.017 crores leaving the auxiliary cableways in its position as it is after commissioning of the main bridge. What the first petitioner and the respondent No.5 offered with

auxiliary cableways being taken away on commissioning of the main bridge is not necessary to be noted here since the offer of the joint venture of the respondent Nos.3 and 4 has been treated as that of auxiliary arrangement being left in position as it is after commissioning of the main bridge. The offer of the joint venture of respondent Nos.3 and 4 is of Rs.518.842 crores. It is, thus, clear that the offer of the joint venture of respondent Nos.3 and 4 is lower than the joint venture offer of the first petitioner and the respondent No.5. Moreover, the respondent No.1 in para 18 of the reply-affidavit has stated thus :

> "It is pertinent to note that the tender of Respondent Nos.3 and 4 is lower by Rs.33.97 crores in fixed components while the Petitioners' quotation for taking away the auxiliary bridge/cable cranes is Rs.7 crores. It is pertinent to note that approximately 85% of the total contract value is fixed value components. The variable quantities are unforeseen and the exact quantities will emerge only at the time of construction. It is likely that the bidders would show lower quantities of variables to bring down the tender costs while at the time of construction, the variable quantities would be in excess of what is shown in the tender. Therefore, for determining the costs of tender, the variable quantities are equated and assumed at 1. This avoids manipulation in the variables to lower the tender price. Using this methodology, the bid of Respondent nos.3 and 4 is found lower by Rs.33.97 crores in fixed components."

14. We do not find anything unreasonable in analysing the offers of the bidders in the manner it has been done by the respondent No.1. Same yardstick has been applied to all the four bidders.

Re : (three) Alteration in design after the award of the contract.

15. Adverting to the third contention raised on behalf of the petitioners, suffice it to observe that in the technical evaluation, the design, erection etc. submitted by both the joint venture of the petitioner and respondent No.5 as well as the joint venture of the respondent Nos.3 and 4 were found satisfactory barring some deviation. We may refer to the observations of the technical committee on the presentations given by the joint venture of the petitioner and the respondent NO.5 as well as the joint venture of the respondent Nos.3 and 4 which read thus :

> "1) M/s.SSANGYONG - HCC (JV) group made a presentation of their technical approach to the project including both Chenab & Anji Khad bridges, explaining the general arrangement, method of analysis, design, erection, maintenance, instrumentation etc. Their approach was

found to be satisfactory, barring some deviations from the tender conditions / codes such as :-

(i) deflection requirements.
(ii) design life (taken as 100 years in place of 120)
(iii) bridge length taken as 1290m for Chenab in place of 1263m and 660m in place of 657m for Anji Khad.

Details of grouting the foundation and of the signaling arrangement were yet to be finalized.

2) The ULTRA - AFCONS - VSL (JV) group made a presentation of their technical approach to the project including both Chenab & Anji Khad bridges, explaining the general arrangement, method of analysis, design, erection, maintenance, instrumentation etc. Their approach was found to be satisfactory, barring some deviations from the tender conditions / codes such as :-

(i) choice of loading and temperature requirements.
(ii) choice of site welding for the members of the arch.
(iii) bridge length taken as 1315m for Chenab in place of 1263m and 608m in place of 657m for Anji Khad.

Further the designs needs to be checked for derailment loads and for providing adequate degree of redundancy."

16. The technical committee that evaluated the technical bids comprised of five members of which three were independent experts namely (i) Prof. & Dr. S.K. Thakkar, Department of Civil Engineering, IIT, Roorkee (ii) Dr.Prem Krishna, Emeritus Prof. of Civil Engineering, IIT Roorkee (iii) Dr.V.V. Nori, Consultant Shirish Patel Associates. In the

technical evaluation that included design approach, code compliance, construction approach, aesthetics, inspection and maintenance facility, redundancy & disaster management, instrumentation, time frame, foundation protection, slope stability, the joint venture of respondent Nos.3 and 4 secured 86 marks out of 100 while the joint venture of the petitioner and respondent No.5 secured 74 marks. The joint venture of respondent Nos.3 and 4 have secured substantial high marks over the joint venture of the petitioner and respondent No.5 in technical evaluation. It is true that after the bid of respondent Nos.3 and 4 was accepted, the Corporation has suggested some modification in the design but such modification does not appear to be major. More of a rethink by the Corporation to go in for conventional type viz., box structure consisting of plots and low sections in place of more modern technology of tubular type. We thus find no substance in the submission of the learned senior counsel for the petitioners that by alteration of design, the technical evaluation could not have taken place.

17. It has been consistently held by the Courts that in arriving at a commercial decision,

commercial considerations are paramount and the Court cannot sit as an appellate authority when the matter for judicial review of such commercial considerations come before it. The Court does not examine the correctness of the commercial decision but is concerned with the process through which such decision has been taken. The whole process through which decision was taken by the respondent No.1 in awarding the contract to the joint venture of respondent Nos.3 and 4 by no stretch of imagination can be said to be unreasonable or arbitrary. It does not lack the transparency or fairness. It is not vitiated by malice in law as canvassed. There are no allegations of malice in fact. The award of contract to respondent Nos.3 and 4 is not inconsistent with the public interest. For all these reasons, we are satisfied that no intervention is called for in the matter.

18. The writ petition is, accordingly, dismissed.

19. At this stage, the learned senior counsel for the petitioners submits that the petitioners are desirous of carrying the matter in appeal to the Supreme Court and the status-quo hitherto being

maintained by the respondent No.2 as per the oral statement of its counsel be ordered to be maintained for some time.

20. For a period of four weeks from today, the respondent No.1 is directed to maintain status-quo.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)